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Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT

OF THE UNITED STATES

October, 1985 Term

FRED A. KOEHLER, Petitioner, vs. ILLINOIS CENTRAL GULF RAILROAD COMPANY, a corporation, Respondent.	)	On Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1985 TERM

NO._____

FRED A. KOEHLER,

Petitioner

vs.

ILLINOIS CENTRAL GULF RAILROAD COMPANY, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT
OF THE UNITED STATES

Petitioner, Fred A. Koehler, herein applies, pursuant to the provisions of Section 1257, Title 28, United States Code and Rule 17 and Rule 21 of the

Supreme Court Rules, for a writ of certiorari to review the judgment of the Supreme Court of Illinois entered the 20th day of December, 1985, affirming the judgment of the Fifth District Appellate Court concluding that a railroad employee covered under the provisions of the Railway Labor Act, 45 U.S.C. §151 et seq., is preempted from an action in state court against his employer for retaliatory discharge.

I

QUESTION PRESENTED FOR REVIEW

Whether a railroad employee covered under the provisions of the Railway Labor Act, 45 U.S.C. §151 et seq., is preempted by the jurisdiction and procedure under said Act from a tort action in state court against his employer for retaliatory discharge.

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The opinion of the Supreme Court of Illinois is reported, 488 N.E.2d 542, 94 Ill.Dec. 543, (1985). The Order denying petitioner's request for a rehearing entered the 4th day of February, 1986, is set forth in full in the appendix.

The opinion of the Fifth District Appellate Court of Illinois is

reported 123 Ill.App.3d 1038, 463 N.E.2d 918, 79 Ill.Dec. 364, (1984).

V

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on the 20th day of December, 1985. Timely Motion for Rehearing was filed, and was denied on the 4th day of February, 1986. This Court has jurisdiction under 28 USCA §1257 and of the Supreme Court Rules 17 and 21.

VI

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

45 U.S.C. §153

> (i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including

> the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of facts and all supporting data bearing upon the disputes.

VII

STATEMENT OF FACTS

Petitioner Fred A. Koehler instituted this action against his employer, respondent Illinois Central Gulf Railroad Company, in the Twentieth Judicial Circuit Court of St. Clair County, State of Illinois. Petitioner alleged in his complaint that he had been retaliatory discharged from his employment for exercising his rights under the Federal Employer's Liability Act, or FELA, (45 U.S.C. Section 51 et seq.). The respondent moved to dismiss the suit,

arguing that resolution of petitioner's complaint for retaliatory discharge came within the exclusive jurisdiction of the National Railroad Adjustment Board pursuant to the Federal Railway Labor Act, 45 U.S.C. Sec. 151 et seq. (1982) (RLA). The trial court denied respondent's motion to dismiss but granted its motion to certify that question for interlocutory appeal pursuant to the Illinois Supreme Court rule 308(a). The following issue was submitted for review:

> "Whether a railroad employee covered under the provisions of the Railway Labor Act, 45 U.S.C. Section 151 et seq., may bring an action in state court against his employer for wrongful discharge without first exhausting his administrative remedies available under the Railway Labor Act."

Petitioner Fred A. Koehler was disqualified as a carman welder by the chief medical officer of the Illinois Central Gulf Railroad on December 12,

1979. As a member of the Brotherhood of Railway Carmen of America, their Helpers and Apprentices, Mr. Koehler was protected by a collective bargaining agreement governed by the Railway Labor Act, 45 U.S.C. Section 151 et seq. Both the collective bargaining agreement and the Railway Labor Act contain specific provisions for processing a grievance for alleged wrongful discharge; however, neither contain a remedy for retaliatory discharge.

On December 19, 1979, Mr. Koehler, through his union representative, processed a grievance under the collective bargaining agreement and the Railway Labor Act for his alleged wrongful discharge. In accordance with the procedures provided in the collective bargaining agreement and the Railway Labor Act, Mr. Koehler's grievance was denied on January 23, 1980.

On February 6, 1980, the general chairman of Mr. Koehler's union submitted a second-level grievance to respondent's manager of labor relations. This second-level grievance was denied in accordance with the applicable procedures on March 26, 1980.

On February 5, 1981, the president of Mr. Koehler's union submitted a grievance on behalf of Mr. Koehler to the National Railroad Adjustment Board under the terms and provisions of the labor agreement and the Railway Labor Act, 45 U.S.C. Section 151 et seq. Mr. Koehler had pursued to completion his administrative grievance.

The Appellate Court granted respondent's application for leave to appeal. In respondent's application for leave to appeal defendant presented the question of whether or not a railroad

employee was preempted under the RLA in filing a claim for retaliatory discharge in state court.

The Appellate Court reversed the Trial Court and entered judgment dismissing petitioner's complaint with prejudice. In so deciding, the court did not address either the issue certified or those briefed by the parties but relied instead on its decision in **Mouser v. Granite City Steel Division**, 121 Ill.App 3d 834, (1984). **Mouser** held that the tort of retaliatory discharge was not available to an employee covered by a collective bargaining agreement. Petitioner sought leave to appeal to the Supreme Court of Illinois. On leave to appeal, the Supreme court entered an order, under its supervisory authority, reversing the judgment of the appellate court and remanding the cause of the

circuit court to proceed in conformity of **Midgett v. Sackett-Chicago, Inc.** (1984), 105 Ill.2d 143. This order was predicated on the belief that the Supreme Court's recent decision in **Midgett** was dispositive. See 101 Ill.2d 566.

Respondent moved for reconsideration of supervisory order. In its memorandum supporting the motion, respondent argued that the RLA preempts any state court adjudication of employment based disputes between railroads and their employees, including an action for retaliatory discharge. Upon reconsideration, the Supreme Court entered the following order:

> "The motion for reconsideration of supervisory order entered in this cause on October 19, 1984, is allowed. Reconsideration of this case will be confined to the federal preemption issue and the collective bargaining agreement issue." (See Appendix)

The Supreme Court of Illinois affirmed the judgment of the Fifth District Appellate Court stating as follows:

> "A thorough reading of the RLA makes clear congress's intent that employment-based disputes between parties covered by the RLA are to be resolved exclusively pursuant to the Act. Under the RLA, state courts have no jurisdiction to hear and resolve disputes. 45 U.S.C. §153(i)(q) (1982). Because plaintiff's tort action for retaliatory discharge is, in essence, an employment-based dispute, we hold that it is preempted by the RLA." (See Appendix)

Petitioner filed a motion for rehearing and was denied on the 4th day of February, 1986.

We seek review of the Illinois Supreme Court's holding that petitioner's claim for retaliatory discharge is preempted under the Railway Labor Act.

VIII

REASONS FOR GRANTING THE WRIT

The decision of the Illinois Supreme Court in the instant cause is completely adverse to the existing line of cases controlling the federal law of preemption. There is no basis in law or logic for preemption of the state tort action of retaliatory discharge in favor of federal procedures concerning resolution of labor contract disputes.

The Illinois Supreme Court's decision in the instant case is not consistent with this court's decision in **Belknap v. Hale**, 462 U.S. 591, 103 S.Ct. 3172 (1983), and **Farmer v. Brotherhood of Carpenters, Local 25**, 430 U.S. 290, 97 S.Ct. 1056 (1977).

Federal law preemption is a complex and confused area of the law. It has been stated that:

> "Preemption is a matter of congressional intent, but the labor statutes provide little or no guidance as to what aspects of state law Congress intended to preempt. See **Belknap v. Hale**, 462 U.S. 591, 103 S.Ct. 3172 (1983).
>
> ***
>
> Essentially, in any preemption case the court must attempt to weigh the state's interests against those of federal labor policy. See **Garibaldi v. Lucky Food Stores, Inc.**, 726 F.2d 1367, 1372-73 (9th Cir. 1984)."

In **Belknap v. Hale**, this Court held that the National Labor Relation Act (NLRA), (219 U.S.C. 151 (1982), did not preempt a misrepresentation and breach of contract action brought against the employer in a state court by a strike breaker. This Court held that where the regulated conduct touched an interest so deeply rooted in local feeling and

responsibility, that, in the absence of compelling Congressional direction, it could not infer that Congress had deprived the states of the power to make a judicial determination. State courts do have jurisdiction over matters which are of traditional state concern.

This Court has set forth a test to determine whether an exception to the preemption rule is appropriate in a particular case. **Farmer v. Brotherhood of Carpenters, Local 25**, 430 U.S. 290, 97 S.Ct. 1056, (1977). First, the state's interest in regulating the conduct must be examined. Second, the potential for interference with the federal regulatory scheme must be determined. Third, the state's interest must be balanced against the potential for interference with the federal regulatory scheme. **Farmer**, 430 U.S. at

297-298, 97 S.Ct. at 1061-1062. In Farmer, plaintiff claimed that defendant union's actions in discriminating against him in referrals for employment constituted intentional infliction of emotional distress. The Court held that the claim was not preempted, even though the alleged tortious conduct could form the basis for an unfair labor practice charge.

This Court found the potential for interference with the federal regulatory scheme minimal since the state court action could be adjudicated without resolution of the merits of the underlying labor dispute and the labor proceeding would focus on whether the conduct was an unfair labor practice and not on whether the conduct was tortious.

The Farmer analysis was relied on in Garibaldi v. Lucky Food Stores, 726

F.2d 1367 (9th Cir. 1984). In that case the Ninth Circuit allowed an employee to bring suit in state court alleging that he was discharged for reporting to local health authorities that his employer had ordered him to deliver a load of spoiled milk. The court held that the state's interest in enforcing its local health regulations was strong, and that California could use private tort actions to enforce these regulations without interfering with federal labor policy. The court stated that:

> "It is clear that California's interest in providing cause of action for a violation of public policy or a statute is the enforcement of the underlying statute or policy, not the regulation of the employment relationship.
>
> ***
>
> A claim grounded in state law for wrongful termination for public policy reasons poses no significant threat to the collective bargaining process; it does not alter the economic

> relationship between the employer and employee. the remedy is in tort distinct from any contractual remedy an employee might have under the collective bargaining contract. It furthers the state's interest in protecting the general public--an interest which transcends the employment relationship (citation omitted)." 726 F.2d at 1374, 1375. (Emphasis in original)

In **Kelsay v. Motorola, Inc.**, 74 Ill.2d 72, 384 N.E.2d 353, 23 Ill.Dec. 559, (1978), the Illinois Supreme Court, in establishing the tort of wrongful discharge for filing of a workers' compensation claim, repeatedly highlighted the purpose of the Workers' Compensation Act, Ill.Rev.Stat. Ch. 48, 138.1 et. seq. (1983). The Court stated that the Workers' Compensation Act is a humane law of a remedial nature providing for efficient remedies for and protection of employees by providing them with prompt and equitable compensation for work related injuries. As such, the Act

promotes the general welfare of the state. The court stated that:

> "(T)he legislature enacted the workmen's compensation law as a comprehensive scheme to provide for efficient and expeditious remedies for injured employees. This scheme would be seriously undermined if employers were permitted to abuse their power to terminate by threatening to discharge employees for seeking compensation under the Act. We cannot ignore the fact that when faced with such a dilemma many employees, whose common law rights have been supplanted by the Act, would choose to retain their jobs, and thus, in effect, would be left without a remedy either common or statuatory." **Kelsay**, 384 N.E.2d at 357, 94 Ill.Dec. at 563.

The **Kelsay** decision holds that in recognizing a cause of action for wrongful discharge for the filing of a workers' compensation claim, the State of Illinois sought to ensure that employees will be provided with a remedy for work related injuries. The state interest is not in regulation of the employment

relationship. A claim grounded in state law for retaliatory discharge for this public policy reason furthers the state interest in protecting the general public, an interest which, as in **Garibaldi**, transcends the employment relationship. See **Garibaldi**, 726 F.2d at 1375.

The Illinois Supreme Court expanded the scope of tort liability for retaliatory discharge in **Midgett v. Sackett-Chicago, Inc.**, 105 Ill.2d 143, 473 N.E.2d 1280 (1984). In **Midgett**, the Court ruled that the employee may bring an action for retaliatory discharge in state court regardless of the existence of a collective bargaining agreement. The Court stated that to provide a complete remedy to a victim of a retaliatory discharge an employee must be permitted an action in tort,

independent of any remedy the employee may have under a collective bargaining agreement. See **Midgett**, 105 Ill.2d at 146.

It is apparent that Illinois has a strong public policy to insure the protection of employees from retaliatory discharge, and such interest outweighs any potential for interference with the federal regulatory scheme. Furthermore, the tort for retaliatory discharge as applied here confers state law rights on employees independent of any right established by a collective bargaining agreement.

In an action of retaliatory discharge, the only issues are why an employee was fired and whether that reason was in contravention of clearly mandated public policy. See Palmateer v. International Harvester Co., 85

Ill.2d 124, 421 N.E.2d 867, 52 Ill.Dec. 13 (1981). These determinations are squarely within the expertise of a state court of law. This being the case, not only is the railroad adjustment board without jurisdiction over non-contractual disputes, **Southern-Pacific Company v. Joint Counsel of Dining Car Employees**, 165 F.2d 26 (9th Circuit 1947), but also the board--which is neither a court nor a governmental body (**Dahlberg v. Pittsburg and L.E.R. Company**, 138 F.2d 121, (3rd Cir. 1943)--is not particularly qualified to identify the public policy of Illinois or usurp the fact finding function of a trial court.

In a very recent decision by the United States District Court for the Western Division of Missouri, **Raybourn v. Burlington Northern Railroad Co.**, 602 F.Supp. 395 (1985), the Court quickly

rejected defendant's suggestion that plaintiff's cause of action for false arrest and false imprisonment against the railroad were preempted, even though the alleged improper acts had taken place in the course of defendant's investi- gation of plaintiff with regard to an alleged drinking violation while at work. Plaintiff had been discharged as a result of the violation and had pursued his appeal rights under the contract. Defendant contended that those procedures were plaintiff's only remedy. The Court disagreed.

> "Simply because plaintiff may have arbitrable claim for wrongful discharge does not mean that plaintiff must pursue that remedy and some how seek relief in arbitration for the wrongs here alleged.
>
> There was no effort in enacting the Railroad Labor Act to comprehensively regulate the labor/management relations in that portion of the economy, or to divert from the courts every controversy between the employee

> and the railroad employer. The Court of Appeals for this circuit has rejected efforts to push all such controversies into the exclusive jurisdiction of the administrative bodies, particularly where the administrative remedies appear to be inadequate . . . (Citations omitted). . . . This is not a case where plaintiff is simply trying to relabel claims arising from a discharge as was attempted in **Magnuson v. Burlington Northern**, 576 F.2d 1367 9th Circuit. . . . Plaintiff claims to be the victim of a tort which is legally independent of any contractual claims or grievances that he may have or that may be arbitrable . . . .
>
> While the plaintiff's breach of contract claim may be factually related, it must be processed in another matter. It is sophistry to contend this typical tort claim is covered or precluded by the Railroad Labor Act . . . . 602 F.2d 385 at 387."

The **Raybourn** case is equally applicable here. Petitioner, Fred A. Koehler, is a victim of a tort, legally independent of any contractual claim or grievance. He claims that the respondent

took a course of action with the intent to harm him and to dissuade other similar employees from pursuing their rights under the FELA. He has not claimed any breach of contract, but rather a breach of a duty owed him by the respondent to refrain from intentionally causing him harm. Nothing in the union contract prevents the respondent from acting with the specific intent to cause harm to plaintiff in a retaliatory discharge for filing an FELA claim. Illinois law permits recovery for such tortious conduct and plaintiff should be entitled to pursue his civil remedy. **Midgett v. Sackett-Chicago, Inc.** 104 Ill.2d 143, 85 Ill.Dec. 475, 473 N.E.2d 1280 (1984).

Moreover, the decision of the Supreme Court of the State of Illinois in the instant case is not consistent with their holding in **Wheeler v.Catepillar Tractor Co.** 85 N.E.2d 372, 92 Ill.Dec. 561

(1985). In **Wheeler**, the Illinois Supreme Court held that Congress did not intend to preempt actions for the tort of retaliatory discharge by enacting the Energy Reorganization Act provision which permits employees to be reinstated in his employment and recover compensatory damages. (42 U.S.C. Sec. 5851 (1982).) The Court stated as follows:

> "Under the provisions of section 5851 an employee may be reinstated in his employment and recover compensatory damages, but no provision is made for punitive damages. In **Midgett v. Sackett-Chicago, Inc.** 105 Ill.2d 143 (1985), 85 Ill.Dec. 475, 473 N.E.2d 1280, it was held that a wrongfully discharged employee whose employment was covered by a collective-bargaining agreement providing for grievance procedures was not required to exhaust those procedures prior to bringing an action for the tort of retaliatory discharge. The court reasoned that such an employee had a cause of action in tort independent of any contract remedy which may have been based on the collective-bargaining agreement. Citing **Kelsay v. Motorola, Inc.** 74 Ill2d 172, 23 Ill.Dec. 559, 384 N.E.2d 353

> (1978), the court held that he was not limited to the remedies provided in the collective-bargaining agreement and could seek to recover punitive damages. We find the situation here analogous to **Silkwood** and conclude that it was not the congressional intent to preempt the field." 485 N.E.2d at 376, 92 Ill.Dec. at 565.

Analogous to the Energy Reorganization Act, no provisions of the Railway Labor Act protect employees under collective bargaining agreements governed by the Railway Labor Act against retaliatory discharge.

Throughout this cause, respondent's reliance on **Andrews v. Louisville Nashville Railroad Company**, 406 U.S. 320, 92 S.Ct. 1562, (1972), 32 L.Ed.2d 195 (1956) and **Jackson v. Consolidated Rail Corp.**, 717 F.2d 1045, (7th Cir. 1983), has been misplaced and these cases are not applicable precedent. These cases hold only that contractual disputes

must proceed through the RLA's administrative procedure even if the parties have agreed otherwise.

There is no basis for asserting that Andrews or Jackson extends the preemptive effect of the RLA beyond contractual disputes. The Andrews case dealt only with employees claiming wrongful discharge arising out of the interpretation of the collective bargaining agreement. The Court in Andrews stated:

> "Thus, petitioner's claim, and respondent's disallowance of it, stem from different interpretation of the collective bargaining agreements . . . . and disclaimant is therefore subject to the acts requirement that it be submitted to the board for adjustment." 406 U.S. at 325, 92 S.Ct. at 1565.

In the present case it has not been suggested or pled that respondent breached any provision of the contract,

thereby giving the petitioner a remedy under the contract, nor has petitioner pled or relied on any particular provision of the contract as specifically authorizing his actions toward the respondent. Petitioner has contended throughout this cause that defendant has intentionally taken action to punish him and to deter others from the exercise of his and their federally protected rights, conferred by the FELA.

Jackson is also distinguishable for a reason set forth in Justice Simon's dissent on the Court's denial of the petition of plaintiff's petition for rehearing. Justice Simon of the Illinois Supreme Court stated as follows:

> "Retaliatory discharge is a tort arising from state law, while wrongful discharge is an epithet denoting a discharge made in breach of a labor agreement. Retaliatory discharge is not the equivalent of wrongful discharge since the former is not an action premised on the employer's breach of contract. Kelsay v.

> **Motorola, Inc.**, 1978, 74 Ill.2d 172, 167. Regardless of terms contained in a collective bargaining agreement, the elements of retaliatory discharge remain the same. Even if the collective bargaining agreement in this case were written most favorably for an employer, it could at most grant the employer the right to charge the plaintiff at will, in an action for retaliatory discharge would still be well founded.
>
> For this reason, **Jackson v. Consolidated Rail Corp.**, (7th Circuit 1983) 717 F.2d 1045, is not applicable precedent. That Court equated retaliatory discharge with wrongful discharge in violation of a labor agreement, but the two terms are not synonymous. Judge Posner noted in his separate opinion, "Retaliatory discharge is not a grievance within the board's exclusive jurisdiction. Because it would exist even if there were no collective bargaining agreement . . ." 717 F.2d 1045, 1059. (Posners, J., dissent in part). (See Appendix)

To allow a cause of action for retaliatory discharge to other union employees while denying it to a railroad employee governed by the RLA would lead

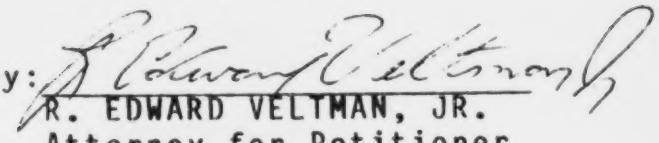
to an absurd result in that punitive damages would be available to other union employees but not to a union employee under a collective bargaining agreement pursuant to the RLA.

The state cause of action for retaliatory discharge is not protected under the RLA. State jurisdiction over the claim will not interfere with the federal contractual scheme. The tort of retaliatory discharge touches on interests so deeply rooted in local feeling and responsibility that it cannot be inferred that federal law will preempt and intend to deprive the state of the right and power to act.

It is therefore respectively requested that this Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

CRAIN, COOKSEY, VELTMAN &
PURSELL, LTD.

By: 

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Petitioner

vs.

ILLINOIS CENTRAL GULF RAILROAD COMPANY, a corporation,

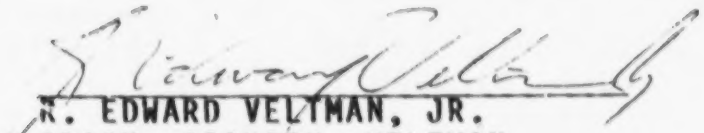
Respondent.

CERTIFICATE OF SERVICE

I do hereby certify that I have mailed to the persons listed below a true and correct copy of the foregoing **PETITION FOR WRIT OF CERTIORARI**, in compliance with 28 U.S.C.A. Rule 28(5)(b), by placing said copy in an envelope, legibly addressed, securely

sealed and sufficiently stamped and depositing same in the United States Mail at Centralia, Illinois at 5 o'clock P.M., all in compliance with said Rule on this date.

DATED this 3rd day of May, 1986.



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ILLINOIS CENTRAL GULF RAILROAD COMPANY, a corporation,	)	Illinois
	)	
Respondent.	)	

ENTRY OF APPEARANCE

Now comes R. Edward Veltman, Jr. of the firm of Crain, Cooksey, Veltman & Pursell, Ltd. and hereby enters his appearance as counsel of record for the petitioner, Fred A. Koehler in the above-entitled cause.

CRAIN, COOKSEY, VELTMAN &
PURSELL, LTD.

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